IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08/04/2004

CORAM

THE HONOURABLE MR.JUSTICE P.D. DINAKARAN
AND
THE HONOURABLE MR.JUSTICE T.V. MASILAMANI

A.S. NO. 880 of 1989

1. Bond Food Products Private Ltd.,
Registered Office at No.80,
4th Block, Koramangala,
Bangalore 560 034.

2. The Oriental Insurance Co. Ltd.,
(now changed and hitherto known as
as the Oriental Fire and General
Insurance Co. having its Divisional
Office No.II, 165, Thambu Chetty
Street, Madras :1 .. Appellants

-Vs-

M/s. Planters Airways Ltd.,
13/5, Kalasipalayam,
New Extension I Floor,
Bangalore: 560 002. .. Respondent

Prayer: Appeal against the judgment and decree made in O.S. No. 4991 of 1985 by the learned II Assistant City Civil Judge at Madras on 29.11.1988.

!For Appellants :: Mr.G. Desappan

^For Respondent :: Mr.K. Bijai Sundar

:J U D G M E N T

(JUDGMENT OF THE COURT WAS DELIVERED BY P.D. DINAKARAN,J.)

The above appeal is directed against the decree and judgment dated 29 .11.1988 made in O.S. No. 4991 of 1995 passed by the learned II Assistant Judge, City Civil Court, Madras dismissing the suit laid by the appellants herein to recover a sum of Rs.56,307.55p with interest @ 12% per annum from the date of plaint till the date of realization.

2. For the purpose of convenience, the parties to the appeal shall be referred to as per their rank in the suit.

3.1. The second plaintiff is the Insurance Company. The first plaintiff entrusted a consignment containing 1080 tins and 77 cartons of biscuits with the defendant in the suit to transport the same from Bangalore to Calicut, under LR No.10843 dated 31.1.1983 and to deliver the consignment to M/s.Bond Food Products Private Limited, C/o. Spencer's & Co. Limited at NO.8/149, Beach Road, Calicut - 673 001, of course, after insuring the same with the second plaintiff for all risks, under Policy No.4120/3/548/M/49/B-OPL, dated 31.1.1983.

3.2. Unfortunately, in an accident that took place on 1.2.1983, during transit from Bangalore to Mysore, the entire consignment was badly damaged and the same was brought to the first plaintiff's factory and at the instance of the first plaintiff, the second plaintiff Insurance Company at Bangalore appointed a Licensed Surveyor (P.W.2) to assess the damages and shortage caused to the consignment.

3.3. The surveyor (P.W.2), after the survey, submitted his report dated 2.3.1983 (Ex.A4), recommending for payment of a sum of Rs.66,368.83p to the second plaintiff towards damages and shortage in quantity of biscuits. On the basis of the Surveyor's Report (Ex.A4) the first plaintiff made a claim on 7.2.1983, marked as Ex.A5; and after negotiation between the first plaintiff and the second plaintiff, the second plaintiff settled a sum of Rs.56,307.55p to the first plaintiff under Ex.A9, viz., the receipt for payment of a sum of Rs.56,307.55p. In consideration of the same, a letter of subrogation (Ex.A8) was executed by the first plaintiff in favour of the second plaintiff; and based on which, the plaintiffs have preferred the above suit.

4. The defendant resisted the suit on the following grounds:
(i) as the accident had taken place during transit between Bangalore and Mysore, outside the jurisdiction of the City Civil Court, Chennai, the plaintiffs are not entitled to file the above suit before the City Civil Court at Chennai;

(ii) the insurance contract entered into between the first plaintiff and the second plaintiff is not binding on the defendant, and as there is no privity of contract between the second plaintiff and the defendant, the defendant is not liable to settle the suit claim;

(iii) the surveyor's report (Ex.A4) is neither admissible in evidence nor binding on the defendant for the following reasons:
(a) the defendant was not given any notice either before the appointment of the surveyor (P.W.2) or before the survey was conducted by the surveyor;
(b) the surveyor's report (Ex.A4) itself was "without prejudice" and therefore, the same could not be relied on as a relevant piece of evidence in view of Section 23 of the Indian Evidence Act; and
(c) the plaintiffs failed to produce documentary evidence relating to the insurance policy entered into between them;
and
(iv) in any event, the plaintiffs having failed to prove the quantum of damage alleged to have been sustained by them in the accident are not entitled for

the relief as prayed for.

5. On the above pleadings, the learned trial Judge framed the following issues for consideration:
(i) Whether the plaintiffs are entitled to seek a claim as prayed for?
(ii) Whether the Trial Court has got jurisdiction?
(iii)To what relief the plaintiffs are entitled to?

6. In order to substantiate the respective plea, the plaintiffs through P.W.1, an officer of the second plaintiff-Insurance Company, and P.W.2, the surveyor, marked 10 documentary evidence of which the following are relevant to be referred to:

(i) Ex-A4 dated 2.4.83 - Surveyor's Report
(ii) Ex-A5 dated 7.2.83 - Letter written by the first plaintiff to the defendant

(iii)Ex-A7 dated 16.7.83 - Reply by the defendant to the first plaintiff in response to Ex-A5
(iv) Ex-A8 dated 29.3.83 - Letter of subrogation

(v) Ex-A9 dated 14.3.83 - Receipt for the payment of Rs.56,307.55p by the second plaintiff to the first plaintiff.
But, the defendant had not chosen to examine any witness on their behalf.

7. Appreciating the above oral and documentary evidence, the learned trial Judge, by decree and judgment dated 29.11.1988, while holding that the City Civil Court, Chennai has jurisdiction to try the suit laid by the plaintiffs, allowed the second issue in favour of the plaintiffs and rejected the claim made by the plaintiffs and held issues 1 and 3 against the plaintiffs on the grounds that,

(i) the second plaintiff failed to produce the policy entered into between them and the first plaintiff;

(ii) the report of the surveyor is not binding on the defendant; and

(iii) in any event, the survey report (Ex.A4) could not be relied upon, as even though the surveyor (P.W.2) recommended for a payment of a sum of Rs.66,368.83p under Ex.A4, the second plaintiff settled only a sum of Rs.56,307.55p to the first plaintiff as per Exs.A8 and A9,

and accordingly dismissed the suit. Hence, the above appeal.

8. The contentions of Mr.G. Desappan, learned counsel for the plaintiffs in support of the appeal could be formulated thus:

(i) the Court below, having held that it has got the jurisdiction to try the suit, ought to have appreciated the evidence of the surveyor (P.W.2) and his report (Ex.A4), as the defendant themselves admitted the quantity of the consignment transported by them from Bangalore to Calicut in their reply dated 16.7.1983 (Ex.A7), in response to the letter dated 7.2.1983 of the first plaintiff (Ex.A5);

(ii) since the first plaintiff entrusted the consignment to the defendant to transport the same from Bangalore to Calicut after insuring the same with the second plaintiff under the insurance policy No.4120/3/548/M/49/B-OPL, dated 31.1.1983 and the claim of the plaintiffs is based on the letter of subrogation dated 29.3.1983 (Ex.A8) made under the Insurance Laws, the evidence of the Surveyor (P.W.2) as well as his report (Ex.A4) cannot be lightly disregarded by this Court, merely because no notice was given to the defendant before appointing the Surveyor (P.W.2) by the second plaintiff or before conducting the survey by the Surveyor (P.W.2), when the quantum of the consignment entrusted by the first plaintiff to the defendant was not disputed;

(iii) even though the surveyor's report (Ex.A4) recommended a sum of Rs.66,368.83p and it was "without prejudice", the evidentiary value of the same could not be totally ignored as the words "without prejudice" found in the report would only mean that the recommendation of P.W.2 was subject to negotiation between the plaintiffs 1 and 2, and therefore, the reliance placed on Section 23 of the Indian Evidence Act by the defendant is misconceived; and

(iv) in any event, the defendant, having failed to disprove the claim made on behalf of the plaintiffs, is not entitled to non-suit the plaintiffs.

9.1. Repealing the aforesaid contentions, Mr.K. Bijai Sundar, learned counsel for the defendant placing reliance on Order 41 Rule 33 CPC contends that even though the Trial Court has held that it has got jurisdiction, the defendant can still agitate in the appeal that the trial Court has no jurisdiction, as there was no cause of action within the jurisdiction of the trial Court and the suit is liable to be dismissed for want of jurisdiction.

9.2. Reiterating the submissions already made on behalf of the defendant before the trial Court, learned counsel for the defendant also emphasized the point that the insurance contract entered between plaintiffs 1 and 2 is not binding on the defendant, who is not a party to the same for want of privity of contract between the second plaintiff and the defendant with respect to the insurance policy relied on by the plaintiffs.

9.3. The counsel for the defendant further contends that since the appointment of the surveyor (P.W.2) was unilateral and the survey was conducted by the surveyor without any notice to the defendant, neither the evidence of the Surveyor (P.W.2) nor his report (Ex.A4) is binding on the defendant.

9.4. Argued that Ex.A4 was made "without prejudice" and therefore, the same is not admissible in law in view of Section 23 of the Indian Evidence Act.

9.5. In any event, it is contended that since transport of the consignment from Bangalore to Calicut was made from branch to branch, without invoice for the same, unless the plaintiffs prove the quantity of consignment transported and the value of the same, the quantum of damages and the shortfall in the quantity of the consignment could not be arrived at for awarding damages as sought for. According to the learned counsel for the defendant, the letter of subrogation provides a power of attorney by the consignor, the first plaintiff as a principal, to the insurance company, the second plaintiff as an agent, to sue for damages and therefore, unless the consignor, the first plaintiff as a principal, proves the quantum of damages and shortfall in the quantity of the consignment transported by the defendant, the insurance company, the second plaintiff as an agent is not entitled to seek the relief as prayed for.

10. We have given our anxious consideration to the submissions made on behalf of the parties.

11. In view of the rival submissions at the bar, the following points arise for our consideration:
(i) Whether the defendant is entitled to challenge the jurisdiction of the trial Court without preferring any appeal or cross-appeal against the findings of the trial Court in that regard?
(ii) Whether the suit is liable to be dismissed for want of jurisdiction?
and
(iii)Whether the plaintiffs have substantiated their claim and are entitled for the relief as prayed for?

12.1. Point (i): - Whether the defendant is entitled to challenge the jurisdiction of the trial Court without preferring any appeal or cross-appeal against the findings of the trial Court in that regard?

12.2. In this regard, it is relevant to refer to Order 41 Rule 33 CPC:
"Power of Court of Appeal: The Appellate Court shall have power to pqass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercise in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection (and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees):

Provided that the Appellate Court shall not make any order under section 35A, in pursuance of any objection on which the Court from whose decree the appeal is preferred has omitted or refused to make such order."

12.3. It is settled law that Order 41, Rule 33, CPC, is intended to remove

uncertainty with regard to res judicata and in order to empower the Appellate Court "to do complete justice" between the parties, without standing on technicalities, notwithstanding the scope of the appeal filed by the appellants. Even though no Court can be compelled to make an order under this rule, it cannot be denied that the above rule enables the Appellate Court to prevent the ends of justice being defeated. Of course, such discretion conferred to the Appellate Court has to be exercised in a judicious manner. Therefore, we are of the considered opinion that even though the respondent has not preferred any appeal or cross-appeal challenging the finding of the learned Trial Judge that he has got jurisdiction to try the suit, the respondent is entitled to agitate his claim. Point (i) is answered accordingly.

13.1. Point (2): - Whether the suit is liable to be dismissed for want of jurisdiction?

13.2. A reference to Section 20(c) of the Code of Civil Procedure, in this regard, is relevant:
Section 20 - Other suits to be instituted where the defendants reside or cause of action arises:
Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction: -
(a) ...
(b) ...
(c) the cause of action, wholly or in part, arises.
(emphasis supplied)

13.3. The term "cause of action" used in Section 20(c) of the Code of Civil Procedure denotes the whole bundle of material facts based on which plaintiffs the relief as prayed for. The term "cause of action", therefore, indicates not a piece of evidence on events, but it is a bundle of events. It has no relation to the evidence set up by the defendant nor it depends upon the character of the relief prayed for. In the instant case, the first plaintiff entrusted the suit consignment to the defendant, to transport the same from Bangalore to Calicut, only after insuring the same under Policy No. 4120/3/548/M/49/B-OPL, dated 31.1.1983 issued by the OFG., D.O.No.2, Madras-1, as evident from Ex.A8.

13.4. That apart, pursuant to the appointment of the surveyor (P.W.2) by the second plaintiff and the report of the surveyor (Ex.A4), a sum of Rs.56,307.55p was paid by the second plaintiff on 14.3.1983 at Madras, as evident from Ex.A9, in consideration of which a letter of subrogation (Ex.A8) was executed by the first plaintiff in favour of the second plaintiff to lay the above suit. I t is, therefore, evident that part of the cause of action arose within the jurisdiction of the trial Court.

13.5. Under such circumstances, we have no hesitation to hold that the trial Court has got jurisdiction to deal with the suit.

14.1. Point (3): Whether the plaintiffs have substantiated their claim and are entitled for the relief as prayed for?

14.2. The fact that the first plaintiff entrusted the consignment to the defendant to transport the same from Bangalore to Calicut after insuring the same under Policy No. 4120/3/548/M/49/B-OPL, dated 31.1.1983 is not disputed by the defendant. Even though the suit consignment was transported from branch to branch of the first plaintiff, the quantity of the consignment transported had been admitted by the defendant themselves in the letter dated 16.2.1983 (Ex.A7), the relevant portion of which reads as follows:
"Now, without prejudice and responsibilities we have to say that we witnessed to have delivered the accident involved goods of CN.No.10843 , dt.31.1.1983 as under.

Qty delivered Damaged Wholly/Partly
1.Glucose in Cartoon Box 75 Nos. -do-
2.---do--- Tins 54 -do-
3.Hi-Count Tins 270 -do-
4.Saltine Tins 428 -do-
5.Zoo Tins 190 -do-

Out of 1157 packages 20 tins delivered empty and 120 packages not traceable and delivered short."

14.3. As per Section 9 of the Carriers Act, it is for the defendant to prove that there was no negligence on their part. The negligence on the part of the defendant is, therefore, presumed in law, as per Section 9 of the Carriers Act, unless the contrary is proved by the carrier by evidence and the burden of proof lies on the defendant/ carrier to prove that they were not negligent, vide
(i) Shanmuga Sundaram Pillia @ Somasundaram Pillai v. National Insurance Co. Ltd., 2000 (I) CTC 346;
(ii) Patel Roadways Limited v. Birla Yamaha Limited, 2000 (III) CTC 5 9;
(iii)Economic Transport Organisation etc., v. Dharwad Distt. Khadi Graudyog Sang etc., 2000 (III) CTC 73; and
(iv) United India Insurance Co. Ltd. and another v. Economic Roadways Corporation, 2001 (1) L.W. 301.

14.4. Of course, no notice was given by the second plaintiff to the defendant before appointing the surveyor (P.W.2) to assess the damages; nor the surveyor (P.W.2) gave any notice to the defendant before conducting the survey and submitting his report (Ex.A4) recommending for a payment of Rs.66,368.83p. Even though serious objections are made by the learned counsel for the defendant as to the reliance placed on Ex.A4 on those grounds, we are unable to appreciate the same in view of the decision of the Madhya Pradesh High Court in Gwalior Transport Co. Ltd. v. National Insurance Co. Ltd., 1991 ACJ 811, wherein Mr.R.C.Lahoti,J., as His Lordship then was, held as under:
"The surveyor is an expert in the field of survey and unless there be something positive to discredit him, his assessment has to be accepted. It would have been better if he had assessed the quantum of damages in the

presence of the appellant. However, the plaintiff would not be non suited and the survey conducted by C.P.Sarwahi would not be discarded solely for this reason. A civil case has to be decided on preponderance of probabilities. The goods were delivered from the custody of the carrier to the consignor who was also the consignee and there was nothing which prevented the carrier from employing a surveyor for assessment of damages specially when an open delivery was being insisted upon. The carrier could also have insisted on a survey being conducted in his presence which was not done. In the matter of assessment of partial loss to the goods, some guesswork has to be allowed. The price of the contents of bales is based on the invoices. Discount has been given for the value of the salvage. Primarily, the payment was to be made by the insurance company because the consignor was claiming from it. There is no reason to assume that any extra or unreasonable assessment would have been acceptable to the insurance company."
(emphasis supplied)

14.5. When the defendant/carrier failed to employ a surveyor for the assessment of the damages on his own and also failed to prove that they have not committed any negligence, the evidence of the Surveyor (P.W.2), the report of the surveyor (Ex.A4), and his assessment with respect to the quantum of damages have to be accepted.

14.6. The further contention made on behalf of the defendant is that the report of the surveyor (Ex.A4) was "without prejudice" and therefore, the same is not relevant to the issue, in view of Section 23 of the Indian Evidence Act, which reads as follows:
"Section 23: Admissions in civil cases when relevant: In civil cases no admission is relevant if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given."

14.7. But, in our considered opinion, the recommendation of the surveyor (P.W.2) that his assessment with respect to the quantum of damages is "without prejudice" would only mean that the same is subject to negotiation between the first plaintiff (consignor) and the second plaintiff (insurance company). In the instant case, even though the surveyor (P.W.2) had assessed the damages to the tune of Rs.66,368.83 p, the first plaintiff agreed to receive a sum of Rs.56,307.55p towards the damages waiving the differential amount. Therefore, neither the opinion of the surveyor (P.W.2) that his assessment with respect to the quantum of damages is "without prejudice", nor the acceptance of a lesser amount by the first plaintiff than recommended by the surveyor (P.W.2), could be a ground to reject Ex.A4 as irrelevant.

14.8. Once the first plaintiff had agreed to receive a lesser quantum of damages than what was recommended by the Surveyor (P.W.2) and executed a letter of subrogation in favour of the second plaintiff, the first plaintiff and the second plaintiff are entitled to claim the damages from the defendant, who is liable to idemnify the plaintiffs 1 and 2 for the loss caused to the consignment.

14.9. It thus leads to the next question, viz., as to the scope of letter of subrogation, and to deal with the next contention of the learned counsel for the defendant that the letter of subrogation provides a power of attorney by the consignor, the first plaintiff as a principal, to the insurance company, the second plaintiff as an agent, to sue for damages and therefore, unless the consignor, the first plaintiff as a principal, proves the quantum of damages and shortfall in the quantity of the consignment transported by the defendant, the insurance company, the second plaintiff as an agent is not entitled to seek the relief as prayed for.

14.10. In its literal sense, subrogation is the substitution of one person for another. The doctrine of subrogation confers upon the insurer the right to receive the benefit of such rights and remedies as the assured has against third parties in regard to the loss to the extent that the insurer has indemnified the loss and made it good. The insurer is, therefore, entitled to exercise whatever rights the assured possesses to recover to that extent compensation for the loss, but it must do so in the name of the assured, vide Oberai Forwarding Agency v. New India Assurance Co. Ltd., (2000) 2 SCC 407.

14.11. The distinction between the subrogation and assignment, as explained in the standard textbook Insurance Law by MacGillivray & Parkington (7th Edition), is referred to as follows:
"1131. Difference between subrogation and assignment:- Both subrogation and assignment permit one party to enjoy the rights of another, but is is well established that subrogation is not a species of assignment. Rights of subrogation vest by operation of law rather than as the product of express agreement. Whereas rights of subrogation can be enjoyed by the insurer as soon as payment is made, as assignment requires an agreement that the rights of the assured be assigned to the insurer. The insurer cannot required the assured to assign to him his rights against third parties as a condition of payment unless there is a special clause in the policy obliging the assured to do so. This distinction is of some importance, since in certain circumstances an insurer might prefer to taken an assignment of an assured's rights rather than rely upon his rights of subrogation. If, for example, there was any prospect of the insured being able to recover more than his actual loss from a third party, an insurer, who had taken an assignment of the assured's rights, would be able to recover the extra money for himself whereas an insurer who was confined to rights of subrogation would have to allow the assured to retain the excess.

1132. Another distinction lies in the procedure of enforcing the rights acquired by virtue of the two doctrines. An insurer exercising rights of subrogation against third parties must do so in the name of the assured. An insurer who has taken a legal assignment of his assured's rights under statute should proceed in his own name..."

14.12. We are, therefore, unable to accept the argument made on behalf of the defendant that the letter of subrogation is only a power of attorney, particularly in view of the relevancy and and admissibility of the evidence of the Surveyor (P.W.2) and his report (Ex.A4), as well as Exs.A7, A8 and A9, assessing the damages and shortfall of the goods entrusted to the

defendant for transportation from Bangalore to Calicut.

Point (iii) is answered in affirmative.

15. Having considered the matter from all perspectives, we do feel it expedient to record that the trial Court clearly fell into an error. We, accordingly, allow this appeal and set aside the decree and judgment dated 29.11.1988 made in O.S. No. 4991 of 1995 passed by the learned II Assistant Judge, City Civil Court, Madras, and decree the suit as prayed for. No costs.

Index :Yes
Internet:Yes

nv/kpl/sasi

To:

1. The II Assistant Judge
City Civil Court,
Chennai.

2. The Record Keeper
V.R. Section
High Court, Madras.